

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JOHN W. PEROTTI,

Plaintiff,

Case No. 05-60172

v.

Hon. John Corbett O'Meara  
Magistrate Judge Steven D. Pepe

MS. MARLBERRY, Individually and  
as Warden of Milan (MI) FDC, *et al.*,

Defendants.

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**ORDER DENYING MOTION FOR FINDINGS OF  
FACT AND TO AMEND THE JUDGMENT AND DENYING  
PERMISSION TO APPEAL IN FORMA PAUPERIS**

Before the court is Plaintiff's motion for findings of fact and to amend the judgment, filed June 16, 2006. Defendant Warden Tapia filed a response on June 21, 2006. For the reasons set forth below, Plaintiff's motion is denied.

Plaintiff requests that the court enter findings of fact and conclusions of law regarding the dismissal of his complaint. On April 17, 2006, Magistrate Judge Pepe submitted a thorough report recommending the dismissal of Plaintiff's complaint for failure to exhaust his administrative remedies against all Defendants. This court adopted the magistrate judge's report and recommendation as its own findings and conclusions on June 1, 2006. No further findings are required. See Fed. R. Civ. P. 52(a) ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.").

Plaintiff also seeks to expand the record to include documents regarding an

administrative appeal, which are dated May 8, 2006, and May 17, 2006. This exhibit was created after the magistrate judge issued his report and recommendation and was neither before the magistrate nor this court. The court finds that the expansion of the record to include this exhibit is unwarranted. See Tenenbaum v. Caldera, 135 F. Supp. 2d 803, 804 (E.D. Mich. 2001) (noting that Fed. R. App. P. 10 allows the record to be modified “so that it accurately reflects what happened in the district court,’ but does not permit adding material that was never before the district court in the first place.”) (citation omitted).

Plaintiff further seeks permission to appeal *in forma pauperis* pursuant to 28 U.S.C. § 1915. A court may grant *in forma pauperis* status if the court finds that an appeal is being taken in good faith. See 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24 (a)(3); Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). Good faith requires a showing that the issues raised are not frivolous, that is “arguable on the merits.” Id.

In this case, the court found that Plaintiff did not fully exhaust his administrative remedies. This requirement is clear. See Jones-Bey v. Johnson, 407 F.3d 801, 807 (6<sup>th</sup> Cir. 2005). It is equally clear that Plaintiff did not exhaust his administrative remedies with respect to all claims against all Defendants. See id. Accordingly, the court will deny petitioner leave to appeal *in forma pauperis*, because such an appeal would be frivolous. See Allen v. Stovall, 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001).

IT IS HEREBY ORDERED that Plaintiff's June 16, 2006 Motion for Findings of Fact and to Amend the Judgment, including his request to proceed *in forma pauperis* on appeal, is DENIED.

Dated: July 31, 2006

s/John Corbett O'Meara  
United States District Judge

Certificate of Service

I hereby certify that a copy of this order was served upon the parties of record electronically and/or by U. S. mail on July 31, 2006.

s/William Barkholz  
Courtroom Deputy Clerk